

**OPINION
66-36**

May 9, 1966 (OPINION)

Mr. A. J. Greffenius, City Attorney

Valley City, ND

RE: Cities and Villages - Municipal Judge - Availability of Qualifie

This is in response to your letter in which you call our attention to Section 40-18-01 of the North Dakota Century Code, which provides as follows:

"JURISDICTION OF MUNICIPAL JUDGE. The municipal judge within a city or village having a population of three thousand or more shall be an attorney licensed to practice law in this state, unless no person so licensed is available in the city or village and shall have exclusive jurisdiction of, and shall hear, try and determine, all offenses against the ordinances of the city or village, as the case may be. The offices the county justice and municipal judge may not be held by the same person."

You state that a problem arises in the interpretation of the word "available" in certain instances. You make the observation that if a man is to be appointed to the position of municipal judge in order to fill an unexpired term, the attorneys in the city should be asked to accept the appointment. If they decline, then a layman will have to be appointed. You then state the following questions:

1. "An election is a different thing. Assume an attorney files as a candidate for the position of municipal judge; does this mean a layman cannot file because an attorney is available?
2. "Assume a layman files as a candidate and later an attorney files as a candidate. Is the layman required to withdraw his candidacy since an attorney is available?
3. "Assume that a layman and an attorney file, that an election is held without any question being raised and that the layman gets the greater number of votes. Has the layman been duly elected? Or must the attorney be certified to the position because he was available?

All of the foregoing questions apparently must be resolved on the construction and interpretation of the word "available" as found in Section 40-18-01 of the North Dakota Century Code. The term "available" according to Words and Phrases has been judicially construed to mean "ready, accessible, attainable, and obtainable." The term "available" has been construed under numerous unemployment acts. The courts have consistently held that such term means "ready, willing and able." The judicial construction placed upon such term in unemployment compensation acts appears to be applicable to the term as it is found in this section.

It is our opinion that the term "available" as used in Section 40-18-01 of the North Dakota Century Code means "ready, willing and able to serve." By placing this construction on the term "available" we will answer the questions you submitted. In addition to the construction of the term "available" we also take into consideration that the Legislature, by law, provided that a municipal judge is to be elected (See Section 40-14-01 and Section 40-15-01 of the North Dakota Century Code.). The qualifications of a municipal judge for cities of three thousand population or more are contained in Section 40-18-01.

Thus, in direct response to your first question, a layman would not be in a position to run for the office of municipal judge unless there was a specific finding made by the governing body that an attorney licensed to practice law in the state is not available for the office. Such finding would necessarily have to be predicated on more than merely an assumption and would require a polling of all attorneys within the municipality.

As to the second question, when an attorney becomes "available" the layman can no longer qualify for the office. It necessarily follows that as tot he layman candidate, the election would be merely a "dry run."

As to the third question, the answer to the second question would apply. The layman cannot qualify for the office on the basis that an attorney is "available." The layman would be an unqualified candidate. The attorney would be the duly elected officer. However, if the layman was allowed to qualify he would be at least a defacto officer (municipal judge) until appropriate legal action changes the situation.

We agree with you that corrective legislation should be enacted to remedy and clarify some of the apparent ambiguities which can result from the present statute. This should be initiated by the municipalities affected by Section 40-18-01 of the North Dakota Century Code.

HELGI JOHANNESON

Attorney General